

UKRAINE

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Ukraine be retained on the Priority Watch List in 2021.¹

Executive Summary: Weak criminal enforcement remains the most significant obstacle to the growth of the copyright industries in the Ukraine marketplace. There are three reasons why enforcement is inadequate: (i) an antiquated legal regime that cannot properly address online piracy; (ii) a lack of resources; and (iii) the absence of coordinated and effective campaigns against large-scale illegal operations. For the recorded music industry, a separate long-standing problem is the failure to have a proper system for the collective management of music rights. Although positive steps have been taken recently to address collective management through the accreditation of some music-industry collective management organizations (CMOs), the process was not finalized in 2020. The Government of Ukraine should be encouraged to continue on its path to normalize the CMO landscape, including upholding 2019 accreditations and finalizing the most recent (December 20, 2020) accreditations.

Two copyright-related laws were enacted in 2020. One (Bill No. 2255) detailed the authority of the National Intellectual Property Office (NIPO), which replaced the State Intellectual Property Service of Ukraine (SIPSU), closed in 2016. The second (Bill No. 3377) made some minor changes to CMO processes. Ultimately, the CMO bill did not change the composition of the accreditation board (as proposed in earlier drafts), but new legislation (Bill No. 4537) would do so, and should be defeated. One disappointment in 2020 was the decision to allow non-accredited CMOs—including UACRR (for musical compositions)—to continue operations. UACRR, for example, has paid no monies to American rights holders. Separately, a major overhaul of the Copyright Law is underway, unfortunately, without meaningful input from copyright industry stakeholders. There were positive enforcement actions in 2020, including the closure of some large infringing websites and services. As in recent years, there were also a few criminal convictions—although none that resulted in deterrent sentencing of those found guilty of IPR crimes.

The enactment of a package of anti-piracy legislation in 2017 included a clear requirement for Internet Service Providers (ISPs) to respond to notice and takedowns, although the procedures and timetables for takedown notices and responses are unduly complex. Despite these changes, the copyright industries report that there are no effective remedies to enforce the required responses to infringement by ISPs, and no incentives to cooperate because there is also no third party liability in the current law. IIPA additionally recommends that the Government of Ukraine appoint more state IP inspectors to ensure ISP compliance with the law, including the imposition of sanctions (e.g., monetary fines) for non-compliance.

PRIORITY ACTIONS REQUESTED IN 2021

Criminal enforcement:

- Focus criminal enforcement, using the newly adopted and existing laws, on: (i) owners and operators of illegal streaming, pay-per-download, peer-to-peer (P2P) and BitTorrent sites, including sites dedicated to pirated music, film, entertainment software and printed materials; and (ii) the principals of CMOs operating without legal authorization from rights holders, including foreign rights holders; and (iii) the principals and participants of camcording operations.

¹For more details on Ukraine's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ukraine's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Coordinate key agencies, including the National Police and the General Prosecutors Office and their respective enforcement practices and investigations; significantly increase the number of investigations (i.e., criminal searches) and prosecutions; properly resource enforcement authorities, including the specialized Cyber Police Department within the National Police (and a sub-unit dedicated to IP-related crimes); and establish specialized IPR prosecutors within the General Prosecutors Office.

Legal reforms:

- Fully implement the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)).
- Amend the Telecommunications Law and e-Commerce Law to reconcile conflicts to provide clear rules of liability for ISPs and other third party providers of online services that contribute to infringing activities (and similarly in the Copyright Law as noted below).
- Revise the 2018 Law On Collective Management (CMO Law)—to correct 2018 deficiencies, including: (i) fixing the rules used to calculate revenue-based tariffs for collective licensing organizations (including the treatment of “expenses”); (ii) adopting rules to identify current and future rates; and (iii) limiting the scope of extended collective licensing and the role of collective licensing organizations. In addition, the “cable retransmission” definition in the bill violates international treaty obligations because it excludes local broadcasts. The 2018 law also repealed an effective enforcement tool that provided pre-established (statutory) damages. The 2018 change should be reversed to allow rights holders to choose between actual or statutory damages.
- Amend the Copyright Law to: (i) cover all copyrighted materials under the new notice and takedown procedures; (ii) eliminate the need for attorneys to file such notices (and enforce penalties for non-compliance with such notices); and (iii) add clear third party liability for website owners and ISPs that contribute to copyright infringing activities.
- Repeal the requirement to manufacture film prints in Ukraine; and, ensure that amendments to the Media Law are fully consistent with Ukraine’s Bilateral Investment Treaty (BIT) obligations.

THE COPYRIGHT MARKETPLACE IN UKRAINE

The IPR legal regime in Ukraine has lagged far behind the rapid growth of technological advances as access to mobile devices, and the demand for online services for copyrighted materials, have grown considerably in recent years. Ukraine is now home to many advanced coders, hackers and others engaged in highly technical activities that facilitate cybercrimes. The failure of Ukraine to modernize its law and engage in effective and deterrent enforcement means that legitimate markets cannot develop, and the country remains a major exporter of piracy into both the European Union and regional markets.

Online Piracy: The market for licensed materials in Ukraine is being harmed by illegal P2P hosting sites, especially BitTorrent sites, as well as by online streaming sites of music and movies. The video game industry reports that in 2020 (as in 2019), Ukraine ranked second in the world in the number of connections by peers participating in the unauthorized file-sharing of select video game titles on public P2P networks. Ukraine is also ranked second in the world for infringement of video games for the PC platform—in both cases behind only Russia. BitTorrent indexing sites, direct download sites and user-generated content (UGC) sites are the most prevalent in Ukraine (many hosted in Ukraine) with BitTorrent sites (like *monova.org*) being the most popular source of pirated copies of video games in 2020. Direct download sites are the second most popular—from Ukraine or from Russian-based websites, with traffic from Ukraine increasing even as Russian users are blocked from access in Russia. User-generated content sites remain a problem and the notorious *vk.com* remains highly popular in Ukraine. The music industry reports significant economic harm by popular BitTorrent indexing sites such as *rutracker.org*, cyberlockers such as *Turbobit.net*, and stream-ripping sites such as *savefrom.net*. *Fmovies* is a movie and television program piracy website that is very popular in Ukraine. In January 2021 it was included on the U.S. government’s Notorious Markets list (2020), for the second year in a row. From servers in Bulgaria, Ukrainian users regularly stream

unauthorized movies and television programs either directly to computer desktops or through Internet protocol television (IPTV) apps via Piracy Devices.

Online Enforcement: In recent years, the Government of Ukraine has taken some positive steps to improve Internet enforcement. Five years ago, the Government of Ukraine established the Cyber Police Department within the National Police of Ukraine. The Cyber Police have been active in taking down pirate websites. Unfortunately, *ex.ua* (for years on the U.S. government's Notorious Markets list) has resurfaced as a cyberlocker at *fox.net*, and there are reports of infringing material, particularly music being streamed, from that site. According to the copyright industries, some sites have been taken down in Ukraine by a combination of police action and rights holders' actions. Most of the Cyber Police activities have been directed at motion picture and music sites. The motion picture industry reported that police actions have resulted in many illegal sites moving out of Ukraine, but that as of early 2021, at least 41 illegal websites were still being hosted from Ukraine (down from 150 in 2019), with 16 sites under criminal investigation (and another 14 sites deleted their infringing content). In 2020, the Cyber Police also met with copyright industry representatives to discuss ways to cooperate on enforcement actions.

NIPO was formed in 2019 within the Ministry for Economic Development, Trade and Agriculture (MEDTA), but without the proper resources to start operations. In June 2020, Ukraine enacted a new law (Bill No. 2255) to consolidate IPR functions, including registrations, within NIPO, but the law did not vest copyright enforcement authority with the agency. The Government of Ukraine needs to provide MEDTA with strong online enforcement authority. In October 2020, a bill was introduced (Bill No. 4246) to amend the Administrative Offences Code to give clear authority to MEDTA IP inspectors to issue monetary fines against website owners and ISPs (including for non-compliance with the notice and takedown system per Articles 164-17 and 164-18). In 2019, MEDTA appointed seven officials in the Intellectual Property Department to serve as IP inspectors, but many more state IP inspectors are needed, along with the statutory enforcement powers, to be effective. The 2017 anti-piracy package also established a High Court on Intellectual Property Matters for civil cases. It was supposed to start operations in late 2018, but the court is still not in operation. Once operational, it is hoped that the High Court will develop guidelines for judges in other courts to properly handle IP matters and to avoid forum shopping to lenient courts.

In 2010, the Government of Ukraine developed an IPR "Action Plan" in cooperation with the U.S. government to combat and target the digital piracy problem. A decade later, key provisions of the 2010 Action Plan still have not been addressed, including: ISP liability, effective administrative remedies (as well as fixing or eliminating the hologram sticker program). Instead, the 2017 anti-piracy package of laws only partially addressed online piracy by adopting formal notice and takedown provisions; but this alone is not effective enforcement.

Many of the websites offering pirated copyright materials are thriving, in part, because of the support of local ISPs that have no incentive to cooperate with rights holders. This is particularly true in eastern Ukraine where several large piratical operations have started operations, now outside of any enforcement jurisdiction (two music piracy cases have been suspended for this reason). The copyright industries report that, without a Memorandum of Understanding (MOU), ISPs will not cooperate because the laws essentially grant them total immunity.

One major initiative of the past few years, undertaken in cooperation with Ukraine's four major media groups, the largest television channels, and rights holders, has been to monitor advertising of well-known brands on pirate sites. In 2018, the Ukrainian Anti-Piracy Association (UAPA) started to monitor these sites and to notify major brands that are advertised on these sites to get brands to pull their advertisements; UAPA is also sending similar notices to the advertising agencies. After several multi-stakeholder conferences, a list of pirate websites was created for the brands and advertising agencies to identify easily sites to avoid (*blacklists.org.ua*). Rights holders report that the initiative has yielded positive results. In addition, in October 2020, Ukraine signed up to the WIPO piracy alert database to allow advertisers to easily find, and thus not support, pirate websites. Separately, in February 2020, the National Police carried out an operation against a Ukrainian advertising agency for financing pirate websites, and opened a criminal investigation.

Criminal Enforcement: While the Cyber Police have taken down sites, there have been no effective criminal enforcement actions taken against the owners and operators of these websites or hosting services. Criminal enforcement against commercial scale actors is rarely pursued and even more rarely successful. The copyright industries report that the Cyber Police commenced 33 criminal cases in 2020, but only three cases resulted in criminal convictions. Additionally, 65 pirate sites were shut down either by the police or by site owners. The motion picture industry reported two criminal cases against illegal websites, with fines imposed of 20,400 UAH (US\$723) and 34,000 UAH (US\$1,205), respectively. In addition, a camcorder was convicted and fined 3,400 UAH (US\$1,205) in December 2020. There were also four criminal cases for illegal online broadcasts of television channels in 2020, with fines imposed of 3,400 UAH (US\$121) in one case, 34,000 UAH (US\$1,205) in two of the cases, and two years' imprisonment (with a year of probation) in the other case.

The Criminal Procedure Code does not grant police *ex officio* authority, so the police are unable to initiate criminal operations against online piracy unless a rights holder first files a claim for damages. When criminal investigations are undertaken, police efforts are often stymied by a lack of cooperation from ISPs (that refuse to provide information on infringers). Amendments to the Law on Telecommunications, which would have assisted the police in conducting Internet criminal investigations by providing subscriber information, have been proposed in recent years, but not enacted. The copyright industries report that the lack of clear prosecutorial and judicial procedures for Internet-related cases is a bar to effective criminal enforcement, with existing procedures too complicated to be used effectively. IIPA continues to recommend the adoption of guidelines and more effective procedures for police, prosecutors, and judges for these crimes.

Adequate resources for criminal enforcement remain a problem (along with lingering problems from a nationwide police re-organization). It was hoped last year that the number of Cyber Police would rise to 1,600 officers, but instead there are only 804 officers at present. There is also a dedicated sub-unit (a telecommunications crime force) focused on IPR crimes; it has approximately 70 officers and is in need of proper computer equipment.

It has been long-recommended that the Government of Ukraine create a separate IPR unit within the General Prosecutors Office to focus on criminal prosecutions against online piracy operations, and that the unit be properly staffed and trained. Once properly resourced, the sub-unit should be tasked with enforcement actions against owners and operators of infringing websites and services without political interference. Another recommendation is for the Government of Ukraine to form a specialized interagency working group of experts to address IPR crimes, with representation from the Ministry of Interior (i.e., the National Police and Cyber Police), prosecutors, judges, MEDTA representatives, the State Fiscal Service, and other relevant agencies.

The lack of deterrent sentencing is a lingering problem for both digital and hard copy piracy. The current (January 1, 2021) threshold for criminal prosecution is 22,700 UAH (US\$804) per Article 176 of the Criminal Code. The main concern with the threshold is that there is no unified approach on how to calculate a valuation of seized copyright material, so the threshold acts as a bar to criminal enforcement. This is particularly true for online piracy matters (where an official methodology is especially needed). Additionally, enforcement officials have applied the threshold on a per-rights holder basis, which means that when illegal material is seized, if the material of every rights holder does not exceed the threshold, a criminal case cannot proceed (the losses cannot be combined). The requirement of "material composition of a crime" (causing significant material damage) should be repealed from the Criminal Code (Article 176- 1). Also, the maximum fines for infringement are low—51,100 UAH (US\$1,796)—and thus, not deterrents.

There are other criminal procedural problems as well, including: (1) denying the use of rights holder experts (Article 242-6 of the Criminal Procedure Code mandates experts to calculate damages, and there is a scarcity of state experts); (2) delays and case dismissals in pre-trial investigations; (3) the lack of presumptions that rights holders are the infringed (harmed) party; (4) the absence of judicial guidelines to improve IPR case proficiency and sentencing; and (5) a procedural hurdle requiring a court's permission before an investigator or prosecutor can offer forensic evidence. One new online enforcement problem is a "requirement" that rights holders provide proof of actual

damages before cases can proceed. Until recently, indirect evidence was accepted by prosecutors. In addition, prosecutors demand disclosure of business confidential licenses (as examples of damages) in enforcement actions which is inconsistent with Article 242-6.

Provisions exist in the Criminal Code (Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been underutilized by prosecutors. Other lingering enforcement problems are: (1) burdensome proof of ownership requirements in criminal (and civil) cases, including a complete chain of title; (2) the absence (in the Criminal Code) of clear provisions for the confiscation and destruction of infringing goods, including the materials and equipment used for manufacturing; and (3) the requirement that parties in all cases be represented by local counsel (no more *pro se* or power of attorney representations).

Collecting Societies: Collecting societies in the music sector, specifically in connection with broadcasting, public performances, as well as certain other communications to the public (e.g., certain cable retransmissions), can provide cost effective services to both rights holders and users for licensing, collecting, and paying remuneration. A proper collective administration regime allows CMOs to operate with full transparency and accountability, and fair and balanced governance. It also provides for proper accreditation procedures based on the criterion of the largest representation of domestic and foreign repertoire in active use.

The 2018 CMO Law was intended as a starting point for proper accreditation of CMOs. In 2019, MEDTA began to implement the law and accreditations of legal CMOs, despite objections and strong resistance (political and legal) from opponents of reform. After the first accreditation round, the process was halted by the courts, and MEDTA had to re-launch the process. Three industry and artist-supported organizations were eventually accredited in 2019: (1) the Ukrainian League of Copyright and Related Rights (ULASP), accredited to represent performers and producers of sound recordings (and videograms) for public performances; (2) the Ukrainian Music Alliance (UMA) accredited to represent performers and producers of sound recordings (and videograms) for public broadcasting and private copying levies, but not including cable retransmissions; and (3) the Coalition of Audiovisual and Music Rights to license cable retransmissions of copyrighted and neighboring rights works. The All-Ukrainian Agency on Authors Rights was also accredited in 2019 to collect for: (i) resale royalty rights for works of fine art; and (ii) the reprographic reproduction for literary works. CMOs still need to be accredited for the collection of royalties for public performances, including broadcasting, of musical works (musical compositions). In December 2020, the accreditation commission met to continue CMO accreditations. Accreditations of OKUASAP (public performances) and A&P (broadcasting) were forwarded to but not finalized by the MEDTA. As of January 1, 2020 CMOs can collect for broadcasting and public performances of musical works, so these CMOs need to be finalized without delay to avoid lost revenues.

Although two copyright-related bills were enacted in 2020, neither addressed the shortcomings of the 2018 CMO law (and a draft Copyright Law revision bill contains some troubling CMO provisions). The shortcomings in the 2018 law that should be corrected are: (i) problems regarding royalty rate calculations; (ii) no transitional provisions for the application of tariff rates until new rates are set; (iii) a definition of “cable retransmission” that excludes all local broadcasts; (iv) unclear provisions on so-called “second tier” (additional accredited organizations) where a primary CMO exists; (v) troublesome extended collective licensing provisions (allowing CMO collections without rights holder authorization); and (vi) problems with the calculation of damages in copyright cases. Under the old system, CMOs would grant inexpensive licenses to users of copyrighted material to “clear” their obligation to pay private copy levies, public performance licenses, or licenses for online music services. These longstanding problems were one reason for the designation of Ukraine as a Priority Foreign Country (PFC) and the Presidential proclamation in December 2017 to remove Ukraine’s Generalized System of Preferences (GSP) benefits.²

The Copyright Law CMO draft provisions contain several problematic provisions pertaining to the management, exercise and control of a CMO—including who can establish a CMO and mandates for government-

²The 2013 PFC designation was made for three reasons: (1) the failure to implement “an effective and systemic means to combat widespread online infringement of copyright and related rights;” (2) “the unfair, nontransparent administration of the system for collecting societies;” and (3) concerns with prevalent government ministry use of unlicensed computer software.

run registration of works—which threaten to undo the positive changes adopted in 2019. In sum, IIPA welcomes the progress that was been made by the Government of Ukraine in 2019, and encourages the government to support properly accredited CMOs, to finalize the December 2020 accreditations, and continue progress in 2021. Proper accreditation should mean that no more than one society representing the majority of commercially used rights and repertoire (in each sector or category of rights and rights holders) be appointed as the CMO managing the rights under the extended collective licensing and mandatory collective management regime. New proposed legislation (Bill No. 4537), to change the accreditation requirements, as well as to eliminate all private copying levies for rights holders, should be rejected.

Camcording: The 2017 package of anti-piracy reforms included the bill “On State Support of Cinematography” which criminalized camcording (Article 176 of the Criminal Code), as well as the activities of those who finance piratical operations. The new law clarifies that camcording in theaters is illegal for any purpose if done without authorization from the rights holder. Although there are no exceptions in the camcording law, the Copyright Law does include a general undefined “private use” exception that some experts fear may be problematic in regard to camcording activities. In June 2019, the first camcording sentence under the new law—a fine—was imposed; another case was completed in December 2019. However, even with the new law, camcording of motion pictures in theaters and the quick transfer of these illegal copies on the Internet remains a major problem for the motion picture industry. These activities are mostly undertaken by criminal syndicates operating in Ukraine and Russia moving quickly between the two countries.

Between 2011 and 2019, over 197 camcords (including audio only and video only recordings) were sourced from Ukraine. In 2020, there were two MPA-member titles sourced from Ukraine, and six audio only recordings sourced from Ukraine.³ Unfortunately, there were no criminal cases commenced against theater owners for camcording in 2020. Theatrical piracy is also a problem in Ukraine, particularly in small theaters where films are screened without a license (a violation of the Administrative Offences Code (Article 164-6)). In 2020, 40 theaters were investigated by law enforcement agencies for screening prints without a license, 28 theaters were shut down, and five theaters were sanctioned.

Broadcast and Cable Television Piracy: Piracy of content by broadcast and cable television systems, including by the state-owned radio and television networks, continues to be a major problem for the motion picture and recording industries—both by regional and nationwide broadcasters. There are a large number of Ukrainian cable operators that continue to transmit audiovisual programming without licenses. The Government of Ukraine should take actions to ensure that state-funded enterprises pay for the copyrighted content they broadcast. Enforcement authorities should shut down unlicensed operations and use enforcement measures against the operators of these systems. Beginning in January 2020, 23 national television channels started to encrypt their satellite signals, which improved protections. In the music industry, radio broadcasters have refused to pay new (increased) tariffs for the use of music, and state-funded broadcasters in Ukraine are still not paying licensing fees for their use of recorded music.

Administrative Enforcement: Administrative courts should be empowered to hear infringement cases even in the absence of the infringer, and procedures that introduce unnecessary delays and impose unreasonable deadlines, leading to unnecessary case dismissals, should be corrected. One major enforcement hurdle in the Administrative Offences Code (Article 51-2) is the requirement to prove intent of the infringer; intent, while relevant in criminal proceedings, has no relevance in administrative sanctions, and should be deleted from the Code. The Administrative Offences Code (Article 164-17) includes fines for infringing websites that do not respond to takedown notices regarding infringing materials (as well as fines for unfounded claims for blocking content). However, as noted, there are an insufficient number of state IP inspectors to enforce these (or other) IP violations.

³The 2020 camcording statistics are anomalous given the extensive theater closures in Ukraine (and worldwide) due to the COVID-19 pandemic and delays in theatrical releases of motion pictures.

The Government of Ukraine should increase the number of administrative enforcement actions by moving aggressively against copyright-infringing cable transmissions and retransmissions, public performances, and TV and radio broadcasting with administrative (as well as, where applicable, criminal) actions.

Customs Enforcement: The current Customs Code gives Customs officials *ex officio* authority to properly conduct enforcement investigations. Using this *ex officio* authority, Customs officials can seize illegal material at the border without a court order. Unfortunately, Customs authorities within the State Customs Service are not sufficiently engaged in enforcement measures and underutilize their authority. Cooperation with rights holders could be improved as well. IIPA continues to recommend the abolition of the customs registration system altogether because it impedes effective border enforcement. Another matter of concern is the treatment of seized infringing materials. The Customs Code (Article 401) provides that goods failing to clear customs because of alleged IPR infringements, may be seized and destroyed by Customs authorities without a court order (i.e., an expedited destruction). In practice, this procedure is applied only in cases where rights holders notify Customs officials about alleged infringing material; the destruction is then undertaken at the rights holder's expense and it releases the infringer of any administrative liability, and thus any deterrence from repeating its infringing activities. The 2019 amendments to the Customs Code (Law No. 202-IX) were aimed at bringing the Ukrainian code closer to European Union customs standards and practices, including for the destruction of infringing goods (but further improvements to simplify procedures are still needed). The 2019 amendments broadened the scope of authority against counterfeit and pirated goods to improve enforcement, and provided tax authorities with broader *ex officio* enforcement authority. However, the new provisions only entered into force in June 2020, so there is not industry data yet on their effectiveness.

Hologram Stickers: In 2018, Ukraine enacted a minor change to improve the hologram sticker system. The hologram sticker system is, nonetheless, an ineffective means of guaranteeing the authenticity of products or combatting piracy, and the entire system should be repealed.

LEGAL REFORMS

In 2001, Ukraine acceded to the WIPO Internet Treaties. The Copyright Law of 2001 included amendments intended to implement these treaties. Unfortunately, the amendments fell short of complete and effective implementation of the treaty obligations, especially with regard to technological protection measures, by requiring proof of "intentional" circumvention, which is a major impediment to protection. The two 2017 laws—Law of Ukraine #1977-VIII (Cinematography Law) and Law of Ukraine #2147-VIII (procedural amendments) amended the Copyright Law, the Telecommunications Law (and the 2015 e-Commerce Law), the Criminal Code, the Commercial Procedure Code, the Civil Procedure Code and the Administrative Offences Code. Significant additional amendments have been under consideration, and are necessary to modernize the Ukraine IP regime, including for full WIPO Internet Treaty implementation.

Copyright Law: There are many existing Copyright Law deficiencies even after the 2017 amendments. Some, but not all, are addressed in the new current draft. The improvements needed include: (1) clearly defining temporary copies; (2) revising Article 52 to provide licensees of foreign music companies equal treatment as local rights holders; (3) making either the non-payment of music rights royalties or of private copying levies an infringement of copyright and/or related rights; (4) adding statutory damages and/or a system of enhanced damages in order to adequately compensate rights holders and deter further infringement (Article 52—to double actual damages)—the 2018 CMO legislation removed pre-established damages provisions from the law; and (5) ensuring that an unauthorized online distribution, communication, or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage. Important changes for the music industry include: (i) adding exclusive rights for phonogram producers and performers for broadcasting, public performances and cable retransmissions; (ii) adding definitions of rights compatible with the WPPT; (iii) extending the term for producers and performers from 50 to 70 years; and (iv) retaining Article 53 (Copyright Law) without amendment, so that non-payment to an accredited CMO is a copyright/related rights violation.

The 2017 amendments established a notice and takedown regime. Under the 2017 changes to the Copyright Law, a takedown notice must contain specific information and be sent by a licensed lawyer to the hosting provider (ISP); it is deemed to be received when it is sent. The notice triggers specific timetables: 48 hours for the hosting provider to notify the website, and 24 hours to take down the material; there is also a put-back provision (unless the rights holder commences infringement litigation within ten days). A rights holder can alternatively go directly to the ISP if an owner of an infringing website is not identifiable (i.e., not in the Whois database). If the website does not take down the material, the ISP has to do so. The ISP retains its immunity from any (i.e., not just monetary) liability if it complies. The 2017 law included a “repeat infringer” provision, so that if the same material reappears twice within a three-month period on the same website or webpage, the owners of the site or page can be liable. There are no provisions in the new laws for “blocking” infringing websites, only for taking down infringing materials from sites.

There are numerous concerns with the new procedures: (1) they are burdensome—requiring ownership information, instead of a statement or affirmation of ownership; (2) notices must come from an attorney, and with a digital electronic signature; (3) a website owner can refuse action merely by claiming a “right” to use the work and the only remedy is for a rights holder to commence infringement litigation; (4) they only require the hosting provider notify a webpage owner (which could be an uploader) to take material down, rather than acting to do so; and (5) many of the definitions (“websites” and “webpages”) are unclear and appear to be inconsistent with international norms. In addition to these burdensome procedures, the Copyright Law needs to be amended to broaden the scope of works covered under the notice and takedown procedures so that all copyrighted works are covered (it currently excludes literary works and photographs).

The current Law on Telecommunications (Article 40, paragraph 4 on the “responsibility of operators”) bluntly states that ISPs “do not bear responsibility for the content of the information transmitted through their networks.” Further, Article 38 states that ISPs can only disable end-users from the Internet, or block access to (i.e., takedown) infringing websites, with a court order. Citing this statutory language, the Internet Association of Ukraine (IAU), representing the ISPs, takes the position that rights holders need to go after illegal website operators directly, without ISP assistance or cooperation. The 2017 amendments to the Copyright Law (as well as amendments to the Telecommunications Law, but not Articles 38 or 40) only require defined “websites” and “hosting providers” to respond to proper takedown notices or be subject to copyright infringement. This only somewhat limits the overbroad exemption from liability for ISPs and hosting service providers, so many ignore takedown notices. The law is presumed to cover ISPs, but it is unclear whether a website that is hosting third party content (i.e., a “webpage”) is covered, and the 2017 law has not yet been tested in the courts.

Since civil litigation is the only avenue for rights holders for noncompliance with the notice and takedown requests, there needs to be a clear basis for liability for sites and services online, and it should be clear third party liability (that extends beyond merely responding to takedown notices) is applicable to website owners and ISPs. Providing clear third party (ISP) liability is critical for effective enforcement and cooperation with rights holders, and can be done in a manner under generally accepted standards applicable to parties who “induce” infringement, and including obligations on service providers to reasonably gather and retain evidence. The e-Commerce law should also be amended accordingly. Additionally, the 2017 law did not establish a duty to provide information to law enforcement agencies and rights holders, which should be provided.

Criminal Code and Criminal Procedure Code: The 2017 package of amendments included a change to Article 176 to apply criminal remedies to online piracy of all works and sound recordings (the old law only applied to hard copy piracy), and, as noted, added sanctions for camcording. The codes should be further amended to provide: (1) remedies against repeat infringers (within 12 months) that would automatically lead to criminal, not solely administrative prosecution (and, even if each separate infringement is below the criminal infringement threshold); and (2) clear rules in the Criminal Procedure Code for prosecuting infringers, and remedies for intentional infringements related to the obligation to pay music rights royalties.

Ukrainian criminal procedures require rights holders to file complaints to initiate actions, which acts as a bottleneck to successful enforcement. Police should be granted (and should use) the authority to initiate intellectual property criminal cases and investigations for submission to courts. It should also be clear that the police have the authority to seize all copyright products and equipment for use at trial (they currently only do so in software cases).

Administrative Remedies: The 2017 package of amendments added administrative remedies including: (1) Article 164-17 remedies for failure to properly respond to takedown procedures; and (2) Article 164-18 sanctions for “knowingly providing false information” for takedown notices.

MARKET ACCESS ISSUES

There are a number of existing (and at least one proposed) onerous market access barriers impacting the film and television industry.

Compulsory Manufacturing of Film Prints: Ukrainian law requires film prints to be manufactured locally as a prerequisite to the issuance of a state distribution certificate. This requirement to make and transfer prints to the State Film Agency (Derzhkino) to get a distribution certificate applies only to owners of television rights and home video rights—as an obligation to provide film copies for audiovisual works created on different media. For theatrical distributors, the obligation is to provide an option to the Ukrainian licensee to obtain a dubbed film copy. The Law on Cinematography should be amended to repeal these requirements.

Local Language Requirement (Dubbing/Quotas/VAT): Another trade barrier is a 2019 law (that enters into force on July 16, 2021) to mandate that foreign films distributed in Ukraine on home entertainment, broadcast television, and Video-on-Demand (VOD), must be dubbed or voiced in the state language. It exempts theatrical exhibitions which can screen films in their “original” language accompanied by Ukrainian subtitles. The law includes quotas on foreign film screens (a 10% maximum per theater per month). Last, the law applies a VAT that discriminates against imported foreign films. It applies to the distribution, theatrical exhibition, and other public performances of films. Although the VAT provision went into force in 2017, it was suspended “temporarily”—until January 1, 2023—on the exhibition and distribution of domestic films or foreign films dubbed into the state language, if the dubbing is done in Ukraine. As an incentive to dub in the Ukrainian language, there is a 50% discount on the state distribution certificate fee for films dubbed, voiced or sub-titled in Ukrainian.

Draft Media Bill: A proposed new media law would be extremely problematic if adopted: it would require foreign media service providers to register their services, and require VOD services to apply for state certifications for permission to stream individual films or television programs on their services, along with quotas on VOD and other services. This would be a significant bureaucratic obstacle for audiovisual services, and is also contrary to international norms and trade and treaty obligations, including the U.S.-Ukraine BIT.

GENERALIZED SYSTEM OF PREFERENCES (GSP)

IIPA filed a petition in 2011 to have Ukraine’s GSP benefits suspended or withdrawn. On December 27, 2017 (82 FR 61413), the President used his authority—citing 502(c)(5) of the Trade Act of 1974 regarding Ukraine’s denial of “adequate and effective protection of intellectual property rights”—to announce a suspension of the duty-free treatment accorded certain articles (products) from Ukraine under the GSP program. That partial suspension of GSP benefits entered into force on April 26, 2018 and remains in place, although some benefits were restored in October 2019.